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IN THE

Supreme Court of the United States

October Term, 1957.

Docket No. 377

JOSEPH LANZA and SYLVESTER COSENTINO,
Petitioners,

against

NEW YORK STATE JOINT LEGISLATIVE COMMITTEE ON GOVERNMENT OPERATIONS, WILLIAM S. HORAN, individually and as chairman, ARNOLD BAUMAN, individually and as chief counsel,
Respondents.

Petition for a Writ of Certiorari to the Court of Appeals of the State of New York and for a Stay of Proceedings.

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In The

Supreme Court of the United States

October Term, 1957

Docket No.

Joseph Lanza and Sylvester Cosentino,
Petitioners,

against

New York State Joint Legislative Committee on Government Operations, William S. Horan, Individually and as Chairman, Arnold Bauman, Individually and as Chief Counsel,
Respondents.

Petition for a Writ of Certiorari to the Court of Appeals of the State of New York and for a Stay of Proceedings.

Your petitioners, Joseph Lanza and Sylvester Cosentino, by Emanuel Redfield and Edward H. Levine, their counsel, pray that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York and that a stay be granted pending final disposition of the case, restraining respondents from using or publicly divulging the recordings of communications involved in this case.

Opinions Below.

The Court of Appeals wrote four opinions, one for the majority, and three (3) separate opinions by the dissenting Judges. They are reported in 3 N. Y. 2d 92. Copies are annexed hereto, as Appendix A.

The Appellate Division wrote an opinion, reported in 2 App. Div. (2) 531. A copy is printed in the record (R. 23).

Special Term wrote an opinion, reported in 5 Misc. (2) 324. A copy of which is found in the record (R. 12).

Jurisdiction.

(i) The date and time of entry of the judgment of the Court of Appeals is May 24, 1957. A copy is annexed hereto as Appendix B.

(ii) Jurisdiction is conferred on this Court by 28 U. S. C. 1257 (3).

Questions Presented.

This appeal presents constitutional questions of substance:

1. May a branch of the New York State government make surreptitious recordings in violation of the statutory and constitutional right of a prisoner to consult with his attorney in private?

2. May another branch of the government of the State of New York, make use of and publicly divulge such recordings?

3. Did the surreptitious recordings and the threatened use of them amount to a denial of the right of counsel to a person in jail, awaiting a hearing as a parole violator?

4. Did the surreptitious recordings and the threatened use of publicizing them operate to defeat the privilege against self-incrimination?

Constitutional and Statutory Provisions Involved.

The Fourteenth Amendment to the Constitution of the United States, the due process provision thereof.

Statement of the Case.

This action was begun in the Supreme Court of the State of New York by the service of a summons and complaint in which a declaratory judgment and injunction was sought, to restrain the respondents from using and publicly divulging surreptitious recordings made of communications between attorney and client (R. 7).

A temporary injunction was granted by Special Term (R. 12), which also refused to dismiss the complaint as requested by respondents' motion (R. 4).

Thereafter, the respondents appealed to the Appellate Division of the Supreme Court of the State of New York. The Appellate Division reversed the order which granted the temporary injunction, and dismissed the complaint (R. 19, 21).

Thereafter, the Court of Appeals by a four to three vote affirmed the judgment of the Appellate Division which had dismissed the complaint.

The Complaint.

Since the complaint alone is involved here, it is the source of the essential facts material to the questions presented. (*Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123.)

The complaint (R. 7) alleges that the New York State Legislative Committee was empowered by the Legislature to make studies of the efficiency and economy of governments to investigate corrupt practices. During Febru-

ary, 1957, the Committee undertook to investigate facts concerning the violation of parole of petitioner Lanza. That on February 5th and 6th, 1957, petitioner Lanza was incarcerated in the Westchester County Jail. Petitioner Cosentino as attorney for Lanza had a conference there, in the counsel room, with no other person present. By means of some instrument the conversations were recorded without their consent or knowledge.

The petitioner Cosentino on April 12, 1957, was subpoenaed to give testimony before the Acting Commissioner of Investigation concerning the conference. Upon said petitioner's refusal to testify to such communications, a proceeding to punish him for contempt was commenced.

These recordings came into possession of the respondents, who announced in the press on April 26, 1957, that they would conduct hearings beginning April 29, 1957, and that they would use the surreptitious recordings made and divulge them to the public by loud speakers. On April 26, 1957, the petitioner received confirmation from the respondent Arnold Bauman, its Chief Counsel, that the illegally obtained recordings would be publicly divulged.

Immediately upon learning these facts, the petitioners on April 27, 1957, commenced this action by the service of a summons and complaint, accompanied by papers for a temporary injunction.

How Constitutional Questions Were Raised.

A certificate was granted by the Court of Appeals in which it certified that the federal question of a denial of due process was raised and decided by it. The certificate is annexed to the record and a copy is annexed hereto as Appendix C. Under the rule in *Home Insurance Co. v. Dick*, 281 U. S. 397; *Charleston Federal Sav-*

ings & Loan Association v. Alderson, 324 U. S. 182, 186, it is sufficient that the federal constitutional question was raised and passed upon by the Court from which the appeal stems.

The federal questions however were raised in all courts below. Upon oral argument at Special Term the question was presented. That Court ruled in favor of petitioners and held that there was a denial of due process (R. 15, last line), where the Court said:

> "Indeed, to hold or sanction the installation of such devices in counsel rooms is to render worthless the privilege, and deprive any accused of a basic right under our law the right to a free and impartial trial."

In the Appellate Division and in the Court of Appeals the petitioners urged the federal constitutional question in its brief (Due to the speed with which these appeals were treated, the Court of Appeals accepted copies of the briefs used in the Appellate Division as the briefs in its court. A copy of petitioners' brief in the Appellate Division was lodged with Mr. Justice Harlan upon petitioners' application for a stay pending proceedings for certiorari).

The Appellate Division passed upon the questions (R. 25):

> "Of course, communications between an attorney and his client, especially where the client is a defendant in a criminal matter, involves much more than a mere privilege. Also involved is the right to counsel, which carries with it the corollary right to communicate with counsel in secrecy and confidence, and without intrusion, especially by public officials. In this case that constitutional right was violated, and, indeed, violated in an atrocious and inexcusable manner."

In the Court of Appeals the federal question of a denial of due process was raised and decided. That Court has granted a certificate to that effect.

In the opinion of that Court (p. 3a, this Petition), the Court said:

> "Plaintiffs contend that the use and divulgence of the recording in question violate the privilege between attorney and client afforded by the provision of Section 353, Civil Practice Act, and impair the client's constitutional right to counsel."

Again it was said (p. 4a, this Petition):

> "Of course, we agree with the courts below that the secret recording of the conversations in the manner alleged in the complaint was an unreasonable interference with Lanza's right to confer privately with counsel."

Those contentions were raised in the brief of petitioners (appellants) in the Court of Appeals. A copy of the brief was submitted to Mr. Justice Harlan. On page 7 under "The Applicable Provisions of Law" the appellants set forth the text of "United States Constitution, 14th Amendment, Sec. 1." The federal constitutional questions are argued on page 17 in the headnote, of the right to counsel and are argued again at pages 26, 28 and 34.

Judge Desmond in his dissenting opinion said (p. 10a, this Petition):

> "That the citizen's right to counsel is fundamental and that it includes private consultation with an attorney of his choice is settled beyond cavil in this court."

Also in Judge Dye's dissenting opinion throughout, reference is made to the Constitution and the constitutional right to counsel.

Judge Fuld in his dissenting opinion referred to the basic or constitutional principle of right to counsel and that the recordings in question violate due process.

A Stay of Proceedings is Also Necessary.

This petition also seeks a stay pending final disposition of this case. On or about June 4, 1957, the petitioners made application to Mr. Justice Harlan to stay the respondents from using or divulging the recording in question pending the order of this Court on the petition for certiorari. After a hearing before Mr. Justice Harlan, the respondents consented not to make use of or divulge the recordings. It is now requested that in the event a writ of certiorari is granted that a stay also be granted until final disposition of the case.

The Importance and Substantiality of This Case.

This case presents novel questions of a most serious nature affecting not only the entire community, but strike at the heart of the relationship of attorney and client. Here we find the right to counsel thwarted by the intrusions into the confidential relationship by surreptitious recordings in a jail made by one branch of the state government and use sought to be made of them by another branch.

Indeed, counsel had forewarned in all courts that to countenance such intrusions and use of recordings would lead to claims of other prisoners that consultations with counsel cannot be safely made in jail and therefore, the right to counsel is effectively denied.

On June 26, 1957, the *New York Times* carried an article on page 64 which more than realized those warnings. Under the heading "Dio Gets Freedom for Legal

PARLEY" it was said, with reference to the incident stated in this petition:

> "Later, Judge Mullen said:
>
> "'I am not interested in the name of the defendant. I became convinced by what was said by counsel that there was a necessity of permitting the defendants outside the Tombs for the purpose of free consultation.
>
> "'What prompted Mr. Braunstein to say that I do not know. I have an idea that the recent problem that has arisen through somebody putting a tape recording machine in these places, (prisons) leads counsel to believe every one of these places is tape recorded.'
>
> "The conversations of Joseph (Socks) Lanza, a racketeer, and his lawyer were tape recorded in Westchester County Jail recently."

It is submitted, that the case involves the very integrity of the relationship of attorney and client without which the legal profession could not survive, and strikes at the most fundamental concept of due process. That three Judges of the Court of Appeals wrote three separate dissenting opinions is an indication that this case is most important and that the issue is substantial. It is ripe for decision and should be resolved as soon as possible.

ARGUMENT.

The Court of Appeals held that the making of the recordings was an unreasonable invasion of the right to counsel, but it held: (1) that there was no denial of due process in the use of them by the respondents, a legislative committee, and (2) the Court had no power to restrain a legislative committee.

Our contention is that the right to counsel is an integral part of due process and is a fundamental right

protected by the federal constitution. This right implies the corollary that consultation between attorney and client shall be free from intrusion, especially by a governmental agency, when the client is in a jail. In a jail there is no choice of selection of a place free from intrusion. If this right is admitted, then it cannot be defeated because the communications were turned over by the wrongful intruding governmental agency to be used by another governmental agency. The reason is twofold: First, to permit the State, acting by its committee, to make use of the wrong committed by its other agency, the jailors, would disingenuously circumvent the guarantee of privacy afforded and the entire objective of the right to counsel. If the secret talks between an attorney and client can be "bugged" by one State agency to be used by another with impunity, then the original wrongful act is transformed into a rightful act. Second, the communications may contain serious injury to the petitioner Lanza. He might have revealed facts which could put him in jeopardy with serious penalties as a consequence. The privilege against self incrimination is affected. Thus, the very integrity of the relationship between the client and the attorney is at stake.

Once it is established that a constitutional right has been infringed by the recordings and the threatened use of them, it must follow that the judiciary has power to protect the right against everybody including a legislative committee. At least since *Marbury v. Madison*, 1 Cranch 137, has this Court invoked judicial power against legislative conduct that was deemed offensive to the Constitution. It has exercised control against the executive power in like circumstances.

The Right to Counsel.

Lanza was in jail awaiting charges against him as a parole violator resulting from a criminal prosecution.

He therefore was entitled to consult counsel. There is no question in any of the courts below, that Lanza had a right to counsel at this point. Indeed, each and every court below, aggregating 13 judges, emphatically denounced the intrusion into the confidential relationship and right to counsel. This right of counsel, the New York Court of Appeals held is so fundamental, that due process is denied when the conferences between attorney and client are intruded. *People v. Cooper*, 307 N. Y. 253, 259, cert. denied 315 U. S. 898; *Matter of Fusco*, 304 N. Y. 424, 433; *People v. Decina*, 2 N. Y. (2) 133.

See also, *Whiting v. Barney*, 30 N. Y. 330, for a history of the development of the privilege against disclosure of communications between attorney and client, where it was said (332):

> "But as parties were not then obliged to testify in their own cases, and could not be compelled to disclose facts known only to themselves, they would hesitate to employ professional men, and make the necessary disclosures to them, if the facts thus communicated were theirs within the reach of their opponent. To encourage the employment of attorneys, therefore, it became indispensable to extend to them the immunity enjoyed by the party."

This right to communicate with a client, free from compulsory disclosure extends to every type of communication made during the course of professional employment. In *Root v. Wright*, 84 N. Y. 72, 76, it was said:

> "The rule that an attorney cannot disclose communications made to him by his clients is not, as now understood confined to communications made in contemplation of, or in the progress of an action or judicial proceeding, but extends to the communications in reference to all matters which are the proper subject to professional employment."

It therefore follows that the privilege applied to Lanza although he was not at the time awaiting trial on a criminal charge.

The Right is a Federal One.

In *Powell v. Alabama*, 287 U. S. 45, it was held that an accused person had a right to consult with counsel not only at a trial but at all stages of preparation and assistance.

The Court also said (at 69):

> "If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and therefore, of due process in the constitutional sense."

See also, *Avery v. Alabama*, 308 U. S. 444.

In *Glasser v. United States*, 315 U. S. 60, 76, in speaking about the absolute right to counsel this Court said:

> "The right to have counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."

In *Coplon v. United States*, 191 F. (2) 749, cert. denied, 342 U. S. 926, it was held that the interception of telephone conversations between attorney and client was an effectual denial of due process.

In *Caldwell v. United States*, 205 F. (2) 879, a secret agent for the government obtained employment with defense counsel from which position he transmitted defense information to the government. The Court held that there was no difference between intrusions by telephone as in *Coplon* from intrusions here. Nor was it necessary to show that actual prejudice had resulted to the aggrieved party.

In *United States ex rel. Cooper v. Denno*, 221 F. (2) 626, cert. denied 349 U. S. 968 (this was a further proceeding in the history of *People v. Cooper, supra*), a claim was made that a police officer was planted at a trial to overhear conversations in a foreign language between the accused and his attorney. The Court cited the *Glasser* and *Coplon* cases, *supra*, that it was not necessary to show prejudice to the accused in order to condemn such intrusion. The Court held however, that since due process is dependent upon the setting (citing *Betts v. Brady*, 316 U. S. 455, 462), there was a difference between intrusions that are surreptitious and those in a courtroom, where the conferees take the risk of being overheard.

See also, *re Bull*, 123 F. Supp. 389, where a letter written by a lawyer to a client in jail and intercepted by the jailor, could not be used as the basis for a disciplinary proceeding.

What has been said here is not affected by the recent case of *In re Groban*, 352 U. S. , 1 Law. Ed. (2) 376. In that case a federal right to counsel was denied to a person called before a fife marshal for a preliminary inquiry into the cause of a fire. Aside from the differences of kind and degree that exist between the examination in *Groban* and a person confined in jail, there is a radical distinction in the principle that governs. In *Groban* the question was whether the person required to testify could urge a right to assistance of counsel. Here, the question is may a government wilfully intrude upon the conversations of counsel and client, and thus, effectually destroy that right. To transpose that principle to *Groban*—could the State have intercepted an office conference between *Groban* and his attorney held prior to attendence at the fire marshal investigation? In the conference the client is entitled to speak without fear and also with freedom from self-incrimination.

In connection with *Groban*, it should not be overlooked that four justices (Warren, Black, Douglas, Brennan) dissented and that Justices Frankfurter and Harlan, while concurring in the Court's opinion, nevertheless, noted that due process rests upon differences even of degree in cases. The making of the recordings and the intended use of them by the State of New York is so outrageous and atrocious an invasion of the privacy of both the client and the attorney that at least four justices of this court can say that due process has been infringed.

In this connection reference is made to *Crooker v. California*, 707 Misc., Oct. Term, 1956, where on June 6, 1957, this Court granted certiorari limited to two questions, one of them being:

> "1. Was the defendant denied due process of law by the refusal of the investigation officers to allow him to consult with an attorney upon demand being made to do so while he was in custody?"

The Right Exists at Every Stage of a Criminal Proceeding.

As we have stated—none of the courts below hesitated to denounce the intrusions as an invasion of the right of counsel. As a prisoner in a jail, awaiting the outcome of a hearing concerning his parole status, Lanza had a right to consult with counsel. As was said in *Canizio v. New York*, 327 U. S. 82, 89—a person has a right to consult counsel at every stage and every step in a criminal proceeding.

As the Court observed in *People v. Cooper*, 307 N. Y. 253, 259:

> "The right to counsel, based on fundamental principles of justice, is inherent in the concept of a fair trial (see, e. g., *People v. McLaughlin*, 291 N. Y. 480, 482; *Williams v. Kaiser*, 323 U. S. 471,

473), and included therein, of course, is the right to consult counsel in private, without fear or danger that the people, in a criminal prosecution, will have access to what has been said either openly, by forcing the attorney to divulge what he has learned, or secretly, by the use of a concealed recording device or the planting of a human eavesdropper. (See *Matter of Fusco v. Moses*, 304 N. Y. 424; *Coplon v. United States*, 191 F. 2d 749, certiorari denied 342 U. S. 926.) Intrusion upon a client-lawyer conference, whether in the privacy of an office or at the counsel table in court, contravenes our sense of traditional fair play and due process and is particularly offensive where defendants have sought to keep their conversations and communications secret and confidential by resort to a foreign language. To cull from what was said in *Coplon v. United States* (*supra*, 191 F. 2d 749, 759, certiorari denied 342 U. S. 926). 'The prosecution is not entitled to have a representative present to hear the conversations of accused and counsel.' "

The fact that the confidential talks have already been overheard does not change the principle of the right to consult counsel privately. It is not a question that the secret communication has already been revealed. In *Cooper, Decina* and *Fusco*, the secrets came in the possession of third persons, yet the convictions were voided for that very reason. Furthermore, as the *Glasser* case, *supra*, admonishes us—a Court cannot indulge in nice calculations as to how much prejudice has resulted from a denial to the right of counsel.

That this is an action for injunction does not change the principle involved. As was recently pointed by this Court in *Kingsley Books Inc., v. Brown*, 1 L. Ed. 2d 1469 that injunction is another weapon to attain an objective. In this case, it is the only weapon petitioners have to prevent irreparable injury, and at the same time vindicate the integrity of the relationship between attorney and client.

There can be no doubt that on the basis of the *Cooper*, *Fusco* and *Decina* cases (*supra*), the New York courts would have voided any judgment in any proceeding against Lanza based on disclosures from these intrusions. Therefore, the question arises: Is there any distinction—bearing in mind that the right of counsel is the issue—between a judgment against Lanza after a hearing, in which the intrusion is revealed and a suit by Lanza to avoid publishing the ill-gotten contents of such instrusions, and to prevent irreparable damage to himself? The answer is there is no difference in principle. In both, he is seeking to protect his right to counsel. If an intrusion occurs during and before trial of an accusation, the aggrieved person can object. Here, however, he has no other form of redress, except by affirmative action, such as injunction. In the case where a judgment in a prosecution is voided, it is voided not because of any infirmity in the substantive merits of the action, but rather to protect the right to counsel—called due process. The protection is afforded by the denial of the benefit of the unlawful act to the intruder or to those deriving from him. By voiding of the judgment, it is hoped that such actions would be discouraged. At least, the judiciary does not wish to be a party to such ignoble conduct of the sovereign.

See also, *Rea v. United States*, 350 U. S. 214, 100 L. Ed. 213, where an injunction was granted restraining a federal officer from testifying in a State court prosecution with relation to property he had seized unlawfully.

This case is unlike *Stefanelli v. Minard*, 342 U. S. 117. In that case an injunction was denied in an action brought under the Civil Rights Act. This Court refused to restrain the use in a State court prosecution of evidence obtained by an unlawful search and seizure. The distinguishing factor is that there, a prosecution was pend-

ing and under the applicable State procedure, the evidence was admissible. Here, however, not only is a prosecution lacking, thus leaving injunction as the sole remedy, but also, here, we have a case of the violation of the fundamental right to counsel. Although New York allows in evidence even unlawfully seized items, nevertheless where evidence was unlawfully obtained by intrusion into the relation between attorney and client, a conviction cannot stand. *People v. Cooper, Matter of Fusco, supra.* Therefore, the *Stefanelli* doctrine could not apply here.

To Permit the Use Would be a Denial of Due Process.

This is not a case such as *Wolf v. Colorado,* 338 U. S. 25. In that case this Court recognized that the Fourteenth Amendment protects against an unreasonable search and seizure by a State officer. Yet, the Court held that evidence unlawfully seized could be admitted in evidence in a State trial. There, the question was admissibility alone. Here, the question is one of broader scope and more fundamental. It concerns effective representation by counsel. If a prisoner cannot talk to counsel, the right is defeated.

This case falls into the type of invasion of privacy which was condemned in *Rochin v. California,* 342 U. S. 165. There, this Court held that due process is not accorded when conduct by public officials against citizens "shocks the conscience," and "offend a sense of justice." Thirteen state justices have expressed their revulsion against the conduct of the acts of recording the conferences. To them, as undoubtedly to the members of this Court, and the community, the conduct shocks the conscience. In *Rochin* the Court observed, "All the California judges who have expressed themselves in this

case have condemned the conduct in the strongest language." The parallel with this case is marked.

Even the New York courts as illustrated in the *Cooper*, *Fusco* and *Decina* cases, *supra*, recognize the difference. New York abides by the *Wolf v. Colorado* doctrine (*People v. Defore*, 242 N. Y. 13). Yet, in the cases of invasion of professional privacy it nullified the convictions.

In the recent case of *Breithaupt v. Abram*, 352 U. S. , 1 L. Ed. 2d 448, this Court, although it factually distinguished the acts there as not shocking, nevertheless, reiterated the doctrine of the *Rochin* case. The dissent of Mr. Justice Douglas pointed out that in *Leyra v. Denno*, 347 U. S. 556, this Court recognized that nonviolent methods could also operate to deny due process.

The present case also fits into rationale expressed by Mr. Justice Black in *Rochin*. Here, the petitioner Lanza has been placed where his right to be free from self-incrimination has been defeated. It is not necessary at this point to urge that *Adamson v. California*, 332 U. S. 46, was wrongly decided in withholding the Fifth Amendment's privilege in State prosecutions. It is sufficient to suggest that the recorders of the conversations were not merely indulging themselves idly. Their purpose undoubtedly was to obtain evidence or leads that could be used against Lanza. For all we know, Lanza might have made revelations to his attorney that might subject him to prosecution in a *Federal* court. See, *Slochower v. Board of Higher Education of the City of New York*, 350 U. S. 551; *Quinn v. United States*, 349 U. S. 155.

This Court Has Power to Enjoin a Legislative Committee.

It is inescapable that the jailors who made the recording and the respondents, the legislative committee are

both part of the same governmental machinery that comprises the sovereignty known as the State of New York. it is incredible that an attempt should be made to divide them into a dichotomy, so that the Committee may sanctimoniously say that the jailor's act was outrageous, but it is free to use the recording because it is innocent of the outrage. This makes a mockery of reality. Neither one is free from condemnation. By availing itself of the wrongfully obtained fruits of the intruder, the Committee is a partner in this assault on the professional relationship. It is putting to use what another governmental agency has unlawfuly obtained. Since due process acts against the conduct of the State it is not necessary to atomize the various departments of the State to find the wrongdoer, cf. *Dreyer v. Illinois*, 187 U. S. 71. It is the State that is doing the wrong, and it is the State that the constitution holds responsible to furnish due process.

Once it is established that due process is being denied by a State can there be any question that this Court has ample power to enforce the constitution? Is there anyone, executive, legislator or judge who may deny a right protected by the constitution without being subject to the power of this Court?

The answer is that at least since *Marbury v. Madison*, 1 Cranch 137, it has been established doctrine that an unconstitutional act by a legislature—even after passage by both houses and approved by the governor—may be voided as incompatible with the Constitution of the United States.

Indeed, in *Youngstown v. Sawyer*, 343 U. S. 579, this Court enjoined the President of the United States from seizing and operating steel plants (see also concurring opinion of Justice Frankfurter at pages 595-596, with relation to the injunctive power where a federal right is

invoked). This power extends against the officers of the government, including cabinet members, *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123. See also, *Panama Refining Co. v. Ryan*, 293 U. S. 388; *Work v. Louisiana*, 269 U. S. 250.

To sustain this Court's power to inhibit a constitutional transgression, it is not necessary to show that the power is brought into play through the exercise of affirmative authority granted to the judiciary (cf. Frankfurter, J., in *Watkins v. United States*, 1 L. Ed. 2d 1273, 1300). For instance, in *Jurney v. MacCracken*, 294 U. S. 125, Congress exercised its own power to punish a witness for contempt, without the intervention of the judiciary. Yet, this Court reviewed the action of Congress through *habeas corpus*, against the Sergeant-at-Arms of the Senate. It was the only remedy available to the prisoner. That case is an additional authority to sustain the principle that the judiciary may intervene against anyone including a House of Congress when claim is made of the denial of a constitutional right. That the *habeas corpus* proceeding was directed against an officer of that House does not obscure the reality that it was an application for a writ to undo what the Senate had done. The challenge there was to the power of the Senate to sit in judgment in such a case. It therefore follows, that an action for an injunction against individual members of the Committee and its counsel, although an independent remedy, is nevertheless appropriate.

The petitioners are not attempting to interfere with the right of the legislature to enact laws. All they are seeking is to prevent public use of the illegally obtained recordings. The legislature can legislate without the recordings. As Judge Desmond pointed out below, "If there is anything in this eavesdropped conversation which can aid the Legislature in performing its legislative func-

tions the members of this Committee, having already read this transcript, can form conclusions and transmit them to the Legislature. It is difficult to see how any proper legislative purpose can be served by broadcasting this confidential material." In seeking the relief here there is no interference in the discharge of legislative duties.

The case of *Hearst v. Black*, 87 F. 2d 68, is not decisive, since it was not reviewed by this Court. Moreover, it does not involve the integrity of the relationship between attorney and client. In due process cases, differences of degree are crucial.

In giving support for this argument, this Court will but reiterate what is common doctrine—that no person is beyond the reach of the law, especially when constitutional rights are being impaired. There is no immunity from such restraints for legislators or any public officer, for even New York law reaches out to enjoin them individually, *Pauchogue Land Corp. v. State Park Commn.*, 243 N. Y. 15. All who infringe a constitutional guarantee may be controlled by the courts.

A State court must provide a remedy to redress the invasion of a constitutional right. *Mooney v. Holohan*, 294 U. S. 103, 112, 113; *Moore v. Dempsey*, 261 U. S. 86, 90; *Herbert v. Louisiana*, 272 U. S. 312, 316. The failure to furnish a remedy, as was done here, by a plea of lack of power in the judiciary, in itself raises a federal question that should be resolved in favor of petitioners.

In the recent cases of *Watkins v. United States*, 1 L. Ed. 2d 1273 at 1274, and *Sweezy v. New Hampshire*, 1 L. Ed. 1311 at 1327, it was emphasized that the Bill of Rights affords protection even against transgressions by legislative committees. True, in that case the issue was formulated in an appeal from a judgment of con-

viction for contempt. If petitioners had been compelled to testify before the respondent Committee with respect to these recordings, the *Sweezy* case would have applied. Since the protections of the Bill of Rights can be obtained here only by way of injunction, it follows that the remedy applies against a legislative committee to secure such protection.

What becomes of the constitutional right if this Court should disavow its powers? An attorney could not consult with his client in a jail. No lawyer with perception would feel free to speak there. It would be followed by instance after instance of cases such as illustrated in the *New York Times* incident. Should a Trial Court in its discretion deny a conference outside of jail, then the alternative would be a claim of denial of the right to counsel.

Respectfully submitted,

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APPENDIX A.

Opinions in the Court of Appeals.

FROESSEL, J. Plaintiffs, an attorney and his alleged client, brought this action to restrain defendants, a New York State Joint Legislative Committee, its chairman and counsel, from "using" or divulging a communication said to be confidential and contained in a recording thereof illegally obtained, and for related relief. At the same time, plaintiffs moved for a temporary injunction for the same relief. Defendants cross-moved to dismiss the complaint for lack of jurisdiction and for legal insufficiency under subdivisions 1 and 4 of rule 106 of the Rules of Civil Practice. Special Term, New York County, by two separate orders, granted the injunction *pendente lite*, and denied defendants' cross motion. The Appellate Division unanimously reversed both orders, granted defendants' cross motion to dismiss, and denied the motion for a temporary injunction.

Plaintiffs in their complaint allege, among other things: That the defendant, New York State Joint Legislative Committee on Government Operations, was duly created in 1955* by the Legislature of the State of New York to investigate and examine the management of any State department, board, bureau, commissioner or other agencies of the State; that said committee was empowered by the Legislature to make studies, among other things, of the operation of State government with a view towards determining its economy, efficiency and effectiveness administration of State laws and the detection and prevention of unsound, improper or corrupt practices; and was authorized to exercise the powers granted to legislative committees by the provisions of the Legislative Law. That in February, 1957 the committee undertook to in-

* The exceedingly broad powers of this committee, consisting of eight members, four members of the Senate and four of the Assembly, will be found in N. Y. Legislative Index (1955, p. 604).

vestigate the facts and circumstances concerning the parole violation of plaintiff Joseph Lanza. On April 26, 1957, an announcememnt appeared in the newspapers to the effect that the committee would hold public hearings beginning on April 29th, in the course of which it would make public a certain recording of conversations between Cosentino and his client Lanza, which had come into its possession, and which plaintiffs claim was made without their knowledge or consent. The recording is alleged to have been made on February 5th and 6th in the counsel room of the Westchester County Jail when no one else was present.

Some of the foregoing allegations are contradicted in the affidavits submitted by defendants in opposition to the motion for a temporary injunction. It is true, as referred to in Judge DESMOND's opinion, that the committee counsel stated upon the argument that the intentional secret interception of a confidential communication between attorney and client in the counsel room of a prison is repugnant, but it is also true that he offered to the court the minutes of the committee's hearing which, he stated, would demonstrate beyond doubt that this simply did not take place here. Because of the objection by plaintiffs' attorney, we were not permitted to examine these minutes. Whatever the actual facts may be, however, we are required, on a motion attacking the complaint on its face, to assume its allegations to be true (*Denihan Enterprises* v. *O'Dwyer*, 302 N. Y. 451, 458; *Blanshard* v. *City of New York*, 262 N. Y. 5, 12).

The primary question presented to us is: May the New York State Joint Legislative Committee on Government Operations, an arm of the State Legislature, one of the three co-ordinate branches of our State government, and its named representatives, be enjoined by the courts from making a part of its record at a public session a tape recording and transcript, now in its possession, of an

alleged private conference between Lanza and Cosentino while in a local county jail? It is not denied that the subject matter of this tape recording is within the scope of this committee's inquiry.

Plaintiffs contend that the use and divulgence of the recording in question violate the privilege between attorney and client afforded by the provisions of section 353 of the Civil Practice Act, and impair the client's constitutional right to counsel. The attorney-client privilege is of common-law origin (8 Wigmore on Evidence [3 ed., 1940], § 2290 et seq.; *Whiting* v. *Barney*, 30 N. Y. 330), and as adopted by the people of this State is now embodied in sections 353 and 354 of the Civil Practice Act. Section 353 merely provides that an attorney (and his employees) "shall not be allowed to disclose a communication, made by his client to him, or his advice given thereon, in the course of his professional employment." Section 354 states: "The last three sections apply to any *examination of a person as a witness* unless the provisions thereof are expressly waived upon the *trial or examination* by the * * * client." (Emphasis supplied.) Thus the statute seals the lips of the attorney and affords a privilege against *testimonial compulsion*, unless waived by the client. In other words, it forbids the disclosure of such evidence by an attorney (and his employees) when examined as a witness. So it has been held with respect to physicians, who "are accorded the same statutory recognition, sanction and protection" as attorneys (*Matter of New York City Council* v. *Goldwater*, 284 N. Y. 296, 300; *Buffalo Loan, Trust & Safe Deposit Co.* v. *Knights Templar & Masonic Mut. Aid Assn.*, 126 N. Y. 450). If either should in conversation disclose such secrets, he would, we said in the last-cited case (p. 455), "violate no statute, however reprehensible his conduct would be."

The statute does not inhibit disclosures by other persons who have overheard the conversation (*Cary* v. *White*, 59 N. Y. 336, 339; *Erlich* v. *Erlich*, 278 App. Div. 244; *Sparer* v. *Travelers Ins. Co.*, 185 App. Div. 861; *Hobbs* v. *Hullman*, 183 App. Div. 743; see *People* v. *Decina*, 2 N. Y. 2d 133, 144; *Baumann* v. *Steingester*, 213 N. Y. 328; 8 Wigmore on Evidence [3d ed., 1940], §2326; 58 Am. Jur., Witnesses, § 365; Richardson on Evidence [8th ed.], § 438). It follows that when neither the attorney nor the client is examined as a witness, the statute does not create a right to prevent the disclosure of a confidential communication, and accordingly does not authorize a cause of action for an injunction.

The committee in the instant case does not seek to compel the attorney or the client to testify as to the confidential communication and is not, as in *Matter of New York City Council* v. *Goldwater* (*supra*), invoking the power of the court to compel plaintiffs or anyone else to disclose information they are forbidden to disclose. It is seeking to make a part of the public record of its investigation information which has come to it in the course thereof.

Of course, we agree with the courts below that the secret recording of the conversations in the manner alleged in the complaint was an unreasonable interference with Lanza's right to confer privately with counsel (see *People* v. *Cooper*, 307 N. Y. 253; *United States ex rel. Cooper* v. *Denno*, 221 F. 2d 626, cert. denied 349 U. S. 968; *Atlmayer* v. *Sanford*, 148 F. 2d 161). However, that is not the issue here; it is the "use" of the recording that is sought to be enjoined. The interference by undisclosed persons has already taken place. It is clear that if such interference had occurred in connection with a proceeding directed against Lanza, any resulting determination would be annuled by the courts on the ground that the interference with his right to counsel had destroyed his

constitutional right to a fair trial (*Matter of Fusco* v. *Moses*, 304 N. Y. 424, 433-434; *People* v. *McLaughlin*, 291 N. Y. 480, 482-483; *Caldwell* v. *United States*, 205 F. 2d 879, 881; *Coplon* v. *United States*, 191 F. 2d 749, 757-760, cert. denied 342 U. S. 926; see *People v. Cooper, supra*, pp. 259-260).

Thus, where in the course of a criminal trial the defendant's right to confer privately with his counsel has been violated, the trial is vitiated (*People* v. *McLaughlin, supra*; *Caldwell* v. *United States, supra Coplon* v. *United States, supra*, see *People v. Cooper, supra*). The same rule was applied to set aside a determination of an administrative body where persons accused of corrupt dealings were dismissed after a hearing in the course of which their right to counsel had been denied (*Matter of Fusco* v. *Moses, supra*).

Here it is not claimed that the recording will be used in connection with any action or proceeding directed against Lanza—we merely have a legislative investigation and its findings are binding on no one. Lanza's right to a fair trial is in nowise being impinged upon since there is no trial, present or prospective. None of his property rights is involved. Consequently, the use and disclosure of the communication, unconnected with any proceeding directed against Lanza, as distinguished from the act of recording, is not a basis for an injunction action.

The legislative committee's hearings here involved are not directed against Lanza but are conducted in furtherance of a legitimate legislative object by express authorization of the Legislature itself pursuant to law. Such power of inquiry is an essential auxiliary to the legislative function (*Matter of Joint Legislative Comm. to Investigate State Educ. System* [*Teachers Union*], 285 N. Y. 1, 8; *McGrain v. Daugherty*, 273 U. S. 135, 174 *et seq.*).

No contention is made that the information sought to be used is not relevant to this purpose, and in such case

the judiciary would be usurping authority if it enjoined the legislative branch of our government, in the exercise of its constitutional functions, from using and making a part of its public record the information from the recording involved here. In *Hearst* v. *Black* (87 F. 2d 68), a Senate committee had obtained physical possession of copies of telegrams which had been taken illegally from the telegraph company's offices. It was sought to restrain the committee "from keeping the messages or making any use of them or disclosing their contents." The court distinguished between the act of illegally seizing the telegrams and their later use and disclosure by the committee, and held that a court of equity has no authority to restrain the latter acts, adding (p. 71) that the universal rule "is that the legislative discretion in discharge of its constitutional functions, whether rightfully or wrongfully exercised, is not a subject for judicial interference". (See, also, *Nelson* v. *United States*, 208 F. 2d 505, 513, cert. denied 346 U. S. 827; *Barsky* v. *United States*, 167 F. 2d 241, 250, cert. denied 334 U. S. 843; *Matter of Joint Legislative Comm. to Investigate State Educ. System* [*Teachers Union*], *supra*.)

We can find no authority, constitutional or statutory, empowering the courts to enjoin the Legislature in the assumed fact pattern of this case. To claim inherent power here is nothing more than an assumption of power on the part of one branch of the government as against a co-ordinate branch. This we decline to do. The Legislature is as much a guardian of the liberties of the people as are the courts. We will not assume that the legislative committee will disregard its duty toward any individual who may in anywise be referred to in its public hearings. Indeed, we do not know whether the allegations of the complaint are in fact true. The committee has had extended hearings and has taken substantial evidence. It is in a position to determine the underlying

facts on which it will base any action it may take. The responsibility for such action is that of the committee and the Legislature.

Accordingly, we hold that the drastic remedy of injunction does not lie in this case, and that no sufficient cause of action is stated in the complaint. The judgment appealed from should be affirmed, and the appeal from the order denying the temporary injunction should be dismissed.

DESMOND, J. (dissenting). Defendants are a New York State Legislative Committee authorized to investigate the operations of the State departments, and the committee's counsel, all defendants being sued individually and as officials. Plaintiff Cosentino is a lawyer and according to the complaint was acting as lawyer for coplaintiff during an interview with the latter with no one else present in the counsel room of the Westchester County Jail. According to the pleading, the defendant committee has announced that it has, somehow or other, gotten a recording of that supposedly secret and sacredly confidential lawyer-client conversation and intends to make it public. Plaintiffs bring this suit for an injunction against such disclosure. Special Term denied a motion to dismiss the complaint and granted a temporary injunction. The Appellate Division, although it characterized the recording of an attorney-client interview as "a gross and inexcusable violation", found itself powerless to interfere, and reversed the temporary injunction and dismissed the complaint. Since a temporary injunction grant or denial is not appealable or reviewable here, the only question before us is as to the sufficiency of the complaint to state grounds for relief against this threatened wrong.

Under familiar rules, the allegations of the complaint must at this stage be taken as true. Under equally

familiar rules, the complaint must be held sufficient if, liberally construed, it states in some recognizable form a cause of action known to the law (*Howard Stores Corp. v. Pope*, 1 N. Y. 2d 110, 114, and cases cited). We must keep in mind that at this point in this court plaintiffs, alleging that they are about to be injured irreparably and that they have no protection except an injunction, are asking us for no more than a trial. To accept as true their pleading of what is admittedly a gross wrong and then to turn them away without even a trial is confession by this court of futility an impotence.

On the argument before us the committee's counsel agreed that the secret interception of a confidential exchange between lawyer and client is "repulsive and repugnant" but that the committee nevertheless intends to make public this transcript. Counsel told us in open court that the secret "bugging" of the jail room was done by officials of Westchester County, a subdivision of the State. We are, therefore, officially informed that both the eavesdropping and the threatened divulgence are by agencies of the State of New York. It is argued, however, that the lawyer-client privilege extends to testimonial compulsion only and in any event does not bar third persons from disclosing what they have overheard (Civ. Prac. Act, § 353; see Richardson on Evidence [8th ed.], § 438). If we had here no more than a question of admission or exclusion of evidence, we might reluctantly say that the eavesdropped material could be testified to by its possessor. But such an approach misses the main joint entirely. What plaintiffs are complaining of is a threatened violation of their fundamental constitutional right. A way should be found to raise a judicial bar against such a wrong.

Scrupulously we eschew interference with the functioning of the Legislature. This court will not enjoin legislative action as such regardless of judicial views as to its

legality. But the protection of a citizen's constitutional rights is a court function and no public official or body is beyond the reach of that judicial power (*Youngstown Co.* v. *Sawyer*, 343 U. S. 579). If the President of the United States can be stayed by the courts from seizing the steel mills during a national emergency, a New York State Legislative Committee can be enjoined from a gross violation of a citizen's personal rights, no less valuable, certainly, than Youngstown's property. Years ago this court rejected an assertion by the Attorney-General that "the exercise of a discretion reposed in him as an executive official by the Legislature cannot be supervised or controlled by the courts" (*Carlisle* v. *Bennett*, 268 N. Y. 212, 217). In rejecting that claim of unbridled power this court said that "there are limits to the power of the Legislature" and that it "could not confer upon an executive an arbitrary and unbridled discretion as to the scope of his investigation". No more could it make such a conferral on this defendant committee.

There is another compelling reason for asserting judicial power here. Our traditional system of trial and appeal in criminal cases simply cannot be operated unless lawyer-client interviews in jails and prisons have absolute privacy. Persons accused of crimes and not bailed (see Code Crim. Pro., § 552) or accused of parole violations (Correction Law, §§ 216-218) cannot consult counsel anywhere except in jails and prisons. Such consultion under appropriate conditions (see *People* v. *McLaughlin*, 291 N. Y. 480) is essential to the protection not only of defendants but of the institution of public justice. Eavesdropping and disclosure will destroy the institution itself.

The individual defendants are sued as State officers and individually. Regardless of whether the State or the Legislature or the committee as entities could be enjoined here, there is ample precedent for an injunction against the legislators and their counsel, as such individuals

(*Pauchogue Land Corp.* v. *Long Is. Park State Comm.*, 243 N. Y. 15; *Niagara Falls Power Co.* v. *White*, 292 N. Y. 472, 478; *Erie R. R. Co.* v. *Sells*, 298 N. Y. 58, 61). No men, whatever their offices, can escape individual responsibility for acts done without power or right.

That the citizen's right to counsel is fundamental and that it includes private consultation with an attorney of his choice is settled beyond cavil in this court (*People* v. *McLaughlin*, 291 N. Y. 480, *supra*; *Matter of Fusco* v. *Moses* 304 N. Y. 424; *People* v. *Cooper*, 307 N. Y. 253, 259). According to this complaint and by concession of defendants, that right has been violated here. What measure of damage its further violation will do to plaintiffs we cannot know without a trial. We do know from the complaint that plaintiff Lanza is charged with being a parole violator. We cannot speculate as to what prejudice may befall him from the publication of his confidential talks with his lawyer. If the facts are as they appear from the complaint, such a publication will be grieviously wrong. The courts should do their duty by holding a trial and by granting such relief, interim and permanent, as may be appropriate.

The only proper and legal purpose of legislative investigations is to gather facts in aid of future legislation. If there is anything in this eavesdropped conversation which can aid the Legislature in performing its legislative functions the members of this committee, having already read this transcript, can form conclusions and transmit them to the Legislature. It is difficult to see how any proper legislative purpose can be served by broadcasting this confidential material.

The judgment should be reversed, with costs, and the motion to dismiss the complaint denied.

Dye, J. (dissenting). I dissent and vote to reverse on all the grounds stated by Desmond and Fuld, JJ., to which I wish to add the following: In this controversy we

deal with a problem that, under ordinary circumstances, would be relatively simple—does the complaint state a cause of action? I say relatively simple for if under a fair reading of the allegations it appears that the commission of the threatened act, or a continuance thereof, would produce injury to the plaintiff he is entitled to have it restrained. However, in this instance the nature of the relief sought, and the parties litigant, combine to complicate the situation by posing a threshold question which strikes at the very fundamentals of orderly government. To state it simply and concisely, may judicial authority be invoked to restrain the Legislature from committing an irreparable injury to a personal right long known to the common law, embodied by implication in our State Constitution and codified into our statutes as section 353 of the Civil Practice Act?

Here, as we know, a conversation between a parole violator and his attorney was surreptitiously obtained by the use of an electronic recording, while they were using the counsel room in the Westchester County Jail, and has since come into the hands of the defendants. This conversation the defendants threaten to make public, an action they justify on the broad general theory that it is a part of the public record made in the course of its investigation into "the operation of the State Government * * * administration of the laws and the detection and prevention of unsound, improper or corrupt practices".

Our problem is simplified in great measure by the circumstance that for the purpose of this appeal (1) it is deemed that the subject matter of the recorded conversation is within the scope of the committee's inquiry, and (2) that the relationship of attorney and client exists.

We all agree that section 353 of the Civil Practice Act securely seals the lips of an attorney and affords privilege against testimonial compulsion unless waived by the client.

In the courts below and in the majority opinion, it is pointed out that the protection does not extend to persons who have overheard the conversation. However, we deal here with a conversation obtained by means of an electronic device, the use of which was carefully concealed, was surrepetitious and wholly unauthorized by law. Furthermore, the use of it was at a time and place deemed inviolate to intrusion by others—the sanctity of a counsel chamber during an interview between an attorney and his client.

As I see it, the ancient rule that conversations had in the presence of third persons breaks the seal of privilege—absent a waiver of the privilege by a client—has no relevance when the conversation is unlawfully intercepted by a concealed recording device. Under such circumstances the application of the rule takes on a new significance. A concealed electric device is not a third person in any sense of the word and transcription of the intercepted material does not change its status. In that view the third person exception has no application to this situation. The privilege survives the intrusion. Nor does the fact that this recording is not for use in the course of a trial, but for use in connection with a duly authorized legislative inquiry, operate to bar the privilege. There is a vast difference between the use of material obtained by unlawful search and seizure, and the use of a surreptitious recording of a conversation between a client and his attorney. A search may be had on a proper showing—in only one case may the seal of confidence between a client and his attorney be broken and then only by the client—for unless so waived the court is otherwise powerless to obtain it. The co-ordinate branches of government have no greater or different power in this regard.

It has been asserted that the seal is broken in this instance by the circumstance that the recording was made

by a department of the executive branch and by them turned over to the Legislature, and that under the circumstances the courts are powerless to act. This is not so—the laws of the State apply with equal vigor to all members of society—not only to the citizen in his relation to his government, but to officials in the discharge of their duties in behalf of the citizen. The executive and legislative branches, no less than the judicial, are subject to the mandates and the obligations of the law. It has often been said that ours "is a government of law and not of men". Now the Constitution, so far as I have been able to ascertain, makes no exception; by strong implication the rights of the individual are paramount—being subordinated only to the overriding needs of the general welfare. True, the Constitution does not in so many words make inviolate the confidences of a client and his attorney. However, in order to make certain that the constitutional mandate that no person shall be deprived of life, liberty and property without due process of law (N. Y. Const., art. I, § 6) have effect, the Legislature in its wisdom codified into the State law (Civ. Prac. Act, § 353) an absolute privilege. This salutary provision is a solemn declaration of State policy which all connected with the administration of government are duty bound to observe and make operative—there is no exception.

I submit that just as the courts are bound, so too are the legislative and executive branches of the government—the safeguards provided by law may not be flouted by either. It is a clumsy subterfuge to say that, because the inquiry is not judicial in nature, the Legislature is not bound to observe fundamentals in the discharge of its legislative function. Nothing could be further from the mark. When the citizen's rights are disregarded, our cherished freedoms will end and the government will cease to exist "of, for and by the people".

Several landmark cases have been pointed to in which the courts have intervened to protect the citizen in his property rights, including the restraint of a President of the United States. As a matter of simple truth, personal rights are of equal importance. The Constitution says so and that truth has now become part of our great tradition—the correctness of which is no longer open to challenge. The privilege attached to a conversation between a client and his attorney is as fundamental as anything can be in the administration of government.

The separation of powers is stressed to furnish a basis for creating an exception to the public policy enunciated in section 353. It has been said that the Legislature, whenever it sees fit, may abolish the privilege by repealing or amending the statute—an event which I am sure no member of any Legislature would ever sponsor and, if sponsored, would not support.

We must not lose sight of the undisputed fact that the conversation sought to be publicized was between a prisoner incarcerated in a jail and his attorney. Ostensibly, the prisoner could converse with his lawyer freely, confidentially and in private, without fear of reprisal. As it turns out he had neither freedom, confidentiality or privacy. To "bug" a conversation under such circumstances may not be excused under the guise of prison security. To say so is an affront to the members of the Bar and is a reproach to our governmental system, for to do so is in clear violation of the announced public policy of the State. Lawyers, we must remember, are officers of the court. To sanction disclosure of conversations had with the client—unless waived—strikes at an institution which is far more sacred than the need that legislative inquiries be public. The complaint, as I read it, states a cause of action.

The judgment appealed from should be reversed and the motion attacking its sufficiency should be denied.

FULD, J. (dissenting): I, too, am for reversal, for I do not believe that the courts of this state are helpless to prevent the consummation of a practice so offensive and repugnant as the one disclosed by the papers before us.

It is quite true that in this state evidence, though illegally obtained, is admissible, and it is also true that the statutory provision which protects from disclosure client-attorney communications is aimed at the attorney and not at third persons who may have overheard or learned what transpired at the privileged conference.[1] But in this case we deal with something quite different, something quite unprecedented. In other cases that have arisen, the evidence was potentially admissible; it could have been obtained properly by means of a search warrant or by means of an order permitting interception of telephonic communications. That is not true of the "evidence" with which we are now concerned; here, a search warrant could not possibly have been procured to obtain such evidence, and no order could possibly have been obtained to tap a lawyer's telephone and permit the interception of communications between such lawyer and a client in order to intrude upon privileged conversations.

It cannot be too strongly emphasized that this is not the simple case of a third person eavesdropping on two people who, in this telephonic and electronic age, might be expected to anticipate interception and recording of their conversations. This is a case where the state, or one of its subdivisions, actually invited an attorney into a room so that he and his client might carry on their confidential business in private—indeed, there was no

1. It is noteworthy that the National Conference of Commissioners on Uniform State Laws have proposed a rule which brings within the sweep of the client-lawyer privilege the testimony of any witness disclosing a communication between client and lawyer "if it came to the knowledge of such witness (i) in the course of its transmittal between the client and the lawyer, or (ii) in a manner not reasonably to be anticipated by the client". (Handbook of National Conference of Commissioners on Uniform State Laws [1963], rule 26, p. 179.)

other place where the client could consult with counsel—and, despite the invitation and despite the more basic guarantee of privilege and confidentiality granted by statute, recorded what was said and then, some time later, turned the record over to another branch of state government. It cannot be the law that the state may be a party to such a practice and urge that nothing may be done, when the recording is sought to be introduced into evidence, to prevent disclosure and publication of its contents.

Although I have come on no case involving an occurrence similar to that before us, and that, of course, is readily understandable, this court has had occasion to consider and condemn occurrences not too unlike it and, in my view, those decisions require a reversal and a judgment sustaining the complaint. (See *People v. Cooper*, 307 N. Y. 253, 259; *Matter of Fusco* v. *Moses*, 304 N. Y. 424; see, also, *Coplon* v. *United States*, 191 F. 2d 749.) In these cases, the asserted impropriety occurred during the pendency of a hearing or a prosecution against the client, while in the present case no litigation was pending against the client when the prison authorities recorded his talk with his lawyer. However, the client was then actually under investigation by the parole authorities, if not by other agencies, and, accordingly, the intrusion upon the conference, supposedly private and secret, constitutes the interference and invasion of a person's right to counsel which the courts have always condemned. I repeat what this court declared in *People* v. *Cooper* (*supra*, pp. 259-260), "Intrusion upon a client-lawyer conference, whether in the privacy of an office or at the counsel table in court, contravenes our sense of traditional fair play and due process and is particularly offensive where defendants have sought to keep their conversations and communications secret and confidential * * *. To cull from what was said in *Coplon* v. *United States*

(*supra*, 191 F. 2d 749, 759, certiorari denied 342 U. S. 926), 'The prosecution is not entitled to have a representative present to hear the conversations of accused and counsel.' "

Once it be decided that disclosure and publication of the recorded client-attorney communication impinge on fundamental guarantees, it cannot be that our courts are powerless to prevent the contemplated action. It is to the people of the state that the judiciary owes a duty, and it must ever be alert, to restrain incursions on rights fundamental to individual freedom. Accordingly, when members of a committee of the legislature, in the conduct of a public hearing, misconceive constitutional or basic principles, a court cannot, when its jurisdiction is invoked, refuse to voice an opinion or decline to take action appropriate to the situation presented, however much it may differ from that of the committee.

I would add one further thought in view of a contention advanced by the defendants. It may well be that the communication between the plaintiffs was not privileged, that either there was no relationship between them of client and attorney or, if there was such a relationship, the subject matter was such as to deprive the communication of the privilege and cloak of confidentiality. However, on the strength of the allegations of the complaint, which must be considered as true at this stage of the litigation, we deal with a true client-attorney relationship and a communication unquestionably protected.

The judgment dismissing the complaint should be reversed.

CONWAY, Ch. J., VAN VOORHIS and BURKE, JJ., concur with FROESSEL, J.; DESMOND, DYE and FULD, JJ., dissent in separate opinions in which each concurs.

Upon appeal from judgment: Judgment affirmed.

Upon appeal from order denying temporary injunction: Appeal dismissed.

APPENDIX B.

Judgment of Court of Appeals.

COURT OF APPEALS

State of New York, ss:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 24th day of May in the year of our Lord one thousand nine hundred and fifty-seven, before the Judges of said Court.

Witness,

The Hon. Albert Conway,
Chief Judge, Presiding.

RAYMOND J. CANNON,
Clerk.

Remittitur May 24, 1957.

No. 153.

JOSEPH LANZA & ANO.,
Appellants,

vs.

NEW YORK STATE JOINT LEGISLATIVE COMMITTEE ON GOVERNMENT OPERATIONS, WILLIAM S. HORAN, Individually and as Chairman, ARNOLD BAUMAN, Individually and as Chief Counsel,
Respondents.

BE IT REMEMBERED, That on the 18th day of May in the year of our Lord one thousand nine hundred and

fifty-seven, Joseph Lanza & ano., the appellants in this cause, came here unto the Court of Appeals, by Edward H. Levine and Michael P. Direnzo, their attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgment and order of the Appellate Division of the Supreme Court in and for the First Judicial Department.

And New York State Joint Legislative Committee on Government Operations, William S. Horan, Individually and as Chairman, Arnold Bauman, Individually and as Chief Counsel, the respondents in said cause, afterwards appeared in said Court of Appeals by Boris S. Berkovitch, their attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Edward H. Levine, of counsel for the appellants, and by Mr. Arnold Bauman, of counsel for the respondents, brief filed by *amicus curiae*, and after due deliberation had thereon, did order and adjudge that upon appeal from judgment: the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed. Upon appeal from order denying temporary injunction; the appeal herein be and the same hereby is dismissed.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

THEREFORE, it is considered that upon appeal from judgment; the said judgment be affirmed. Upon appeal from order denying temporary injunction; the said appeal be dismissed, as aforesaid.

Judgment of Court of Appeals

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals
of the State of New York.

Filed
June 4-1957
New York County Clerk's Office

APPENDIX C.

Certificate of Court of Appeals.

In

COURT OF APPEALS,

STATE OF NEW YORK.

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany, on the third day of July, A. D., 1957.

Present:

Hon. Albert Conway, Chief Judge, Presiding.

Mo. No. 283

JOSEPH LANZA & ano.,
Appellants,
vs.
NEW YORK STATE JOINT LEGISLATIVE COMMITTEE ON GOVERNMENT OPERATIONS, WILLIAM S. HORAN, Individually and as Chairman, ARNOLD BAUMAN, Individually and as Chief Counsel,
Respondents.

A motion to amend the remittitur in the above cause having been heretofore made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

Certificate of Court of Appeals

ORDERED, that the said motion be and the same hereby is granted. Return of the remittitur requested and, when returned, it will be amended by adding thereto the following:

> Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz: Appellant Lanza contended that respondents threatened use and divulgence of the recording of Lanza's conversation with his attorney, which use and divulgence are sought to be enjoined in this action would deprive him of due process under the Fourteenth Amendment. The Court of Appeals held that the action said to be threatened by respondents, a lawfully constituted legislative investigating committee, would not in this case deprive appellant Lanza of his constitutional right to due process.

AND the Supreme Court, New York County, is hereby requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A copy

RAYMOND J. CANNON
Clerk

(Seal.)